No. 93-2340

IN THE SUPREME COURT OF
THE UNITED STATES
OCTOBER TERM, 1991

STATE OF MICHIGAN,

Petitioner,

vs.

CLARISSA MARSH,

Respondent.

Supreme Court, U.S.
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PETITION FOR A WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

UNDER THIS COURT'S HOLDING IN MASSIAH V UNITED STATES, 377 US 201 (1964), DOES IT VIOLATE THE SIXTH AMENDMENT RIGHT TO COUNSEL FOR POLICE TO INTERVIEW AN INCARCERATED WITNESS IN THE ABSENCE OF COUNSEL ABOUT GIVING TESTIMONY AGAINST A CO-DEFENDANT IN THE SAME CASE, AFTER HER DIRECT APPEAL HAS RUN ITS COURSE AND A COLLATERAL ATTACK AGAINST HER OWN CONVICTION IN ANOTHER JURISDICTION HAS BEEN DISMISSED?

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IN THE SUPREME COURT OF
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STATE OF MICHIGAN,

Petitioner,

vs.

CLARISSA MARSH,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

NOW COMES the State of Michigan, by John D. O'Hair, Prosecuting Attorney for the County of Wayne, Timothy A. Baughman, Chief of Research, Training and Appeals, and Jeffrey Caminsky, Assistant Prosecuting Attorney, and pray that a Writ of Certiorari issue to review the judgment of the Michigan Court of Appeals, entered in this cause on April 12, 1993, leave to appeal denied by the Michigan Supreme Court June 25, 1993.

OPINIONS BELOW

The ruling of the trial court suppressing Respondent's statement in the prosecution's case-in-chief is unreported, and appended below as Appendix A. The opinion of the Michigan Court of Appeals is unreported, and appended below as Appendix B. The order of the Michigan Supreme Court denying leave to appeal is unreported as yet, and appended below as Appendix C.

STATEMENT OF JURISDICTION

The trial court entered its order suppressing Respondent's statement in the prosecution's case-in-chief on October 30, 1989. Following interlocutory appeals by both parties, the Michigan Court of Appeals issued its opinion and judgment on April 12, 1993. The Michigan Supreme Court denied both parties leave to appeal on June 25, 1993. This Court's jurisdiction is invoked under 28 USC 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment VI to the United States Constitution provides, in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right...to have the Assistance of Counsel for his defence."

Amendment XIV to the United States Constitution provides, in pertinent part:

"...No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

On May 2, 1979, the trial court sentenced Respondent to life imprisonment for two counts of first-degree murder, and one count of assault with intent to murder. Following appointment of the State Appellate Defender's Office as appellate counsel, the Michigan Court of Appeals affirmed Respondent's conviction on December 17, 1980 in an unpublished, per curiam opinion. (COA #46128). The Michigan Supreme Court denied Respondent's delayed application for leave to appeal on February 5, 1982, and denied Respondent's motion for reconsideration on April 30, 1982. During the course of these proceedings, the State Appellate Defender's Office still purported to represent Respondent.

On June 14, 1983, again through the State Appellate Defender's Office,

Respondent filed a Petition for writ of Habeas Corpus in the United States District Court. (ED Mich #83-CV-2665-DT).

On May 18, 1984, Respondent testified about certain facts relevant to the instant prosecution at an evidentiary hearing conducted in Detroit Recorder's Court, in the case of People v Walter Martin, Docket No. 78-07257.

On October 11, 1984, the Hon. Ralph Guy of the United States District Court issued an opinion and order denying Respondent's federal petition; Judge Guy denied Respondent's motion for Certificate of Probable Cause on November 15, 1984.

On June 4, 1985, Respondent gave the statement at issue in this Petition, during an interview with Sgt. James Harris of the Detroit Police Department. This interview

occurred at the Huron Valley Women's Correctional Facility, where Respondent was then in custody, and was reduced to written form and signed by Respondent. Also present was Joseph Koch of the Wayne County Prosecutor's Office. During the interview, nobody representing the State reminded Respondent of her constitutional rights, including her right against self-incrimination and her right to counsel; however, Officer Harris did inform her that she did not have to speak to him. During the course of the interview, Respondent indicated that she would testify for the prosecution in Walter Martin's upcoming trial. On June 7, 1985, the United States Court of Appeals for the Sixth Circuit granted Respondent's application for a certificate of probable cause, and ordered counsel appointed to represent her for the habeas appeal. (Docket No. 84-1777).

On July 2, 1985, the trial judge in the Martin case honored Respondent's assertion of her Fifth Amendment rights, permitting her to decline to testify for the prosecution. The fact of her refusal to testify, on advice of counsel, came as a surprise to the police and prosecution, because she had not indicated any unwillingness to testify until her appearance in court. The prosecution had discussed with defense counsel the possibility of Respondent's testifying for the People in exchange for some concessions, on or about February 1, 1985, but had come to no arrangements satisfactory to both sides. However, the prosecution had made no advance arrangements with counsel, prior to the June 4th interview.

On January 23, 1986, the Sixth Circuit reversed the District Court and remanded the

cause for entry of a writ of habeas corpus. Marsh v Richarson, 781 F2d 1201 (CA 6, 1986). On May 12, 1986, District Judge Barbara Hackett granted a conditional writ; on June 9, 1986, the United States Supreme Court granted Petitioner's petition for a writ of certiorari. (USSC #85-1433). On September 17, 1986, Judge Hackett granted Respondent's motion for personal bond. And on April 21, 1987, the Supreme Court reversed the Sixth Circuit's decision, and remanded the cause for further proceedings. Richardson v Marsh, 481 US 200; 107 S Ct 1702; 95 L Ed 2d 176 (1987). On March 23, 1988, Judge Hackett entered a final judgment granting the writ of habeas corpus, deeming itself bound to do so by this Court's holding on certiorari. On April 29, 1989, the Sixth Circuit dismissed Petitioner's appeal on procedural grounds of untimeliness, leading to the underlying

proceedings in the trial court. Docket No's 88-1464, 88-1606; reported at 873 F2d 129 (CA 6, 1989).

On October 30, 1989, during the course of ruling on pretrial procedural matters, Judge Edward M. Thomas of Detroit Recorder's Court granted in part Respondent's motion to suppress her statement of June 4, 1985. The court held that because the prosecutor's office knew of opposing counsel's involvement in the pending federal case, the police violated Respondent's Sixth Amendment right to counsel by interviewing her in prison during the pendency of her habeas case, and declined to receive the statement in the prosecution's case-in-chief; however, the court also ruled that as the statement was otherwise voluntary in all respections, he would admit the statement for purposes of impeachment.

Both parties having filed interlocutory appeals, the Court of Appeals granted both applications on January 17, 1990 and consolidated the cases. (COA # 122998, 122561). On April 12, 1993, the Court of Appeals affirmed the trial court's ruling in a short, unpublished opinion.

On June 25, 1993, the Michigan Supreme Court denied Petitioner's timely application for leave to appeal. Petitioner now seeks certiorari

REASONS FOR GRANTING THE WRIT

THE SIXTH AMENDMENT RIGHT TO COUNSEL DOES NOT EXTEND TO AN INCARCERATED PRISONER'S POST-TRIAL, POST-SENTENCING, POST-APPELLATE INTERVIEWS WITH THE POLICE.

This case presents a set of unique circumstances, and a novel case of first impression -- ie, whether the Sixth Amendment right to counsel prevents the police from interviewing a potential witness about testifying against a co-defendant, in a case in which her own state court appeals have run their course, and a federal habeas suit is pending on her own appeal in the Federal Court of Appeals. While Petitioner can find nothing on point, common sense suggests that one's right to counsel cannot extend further than one's right to appeal -- and that so long as the police do nothing to render the statement involuntary, nothing prevents them from initiating contact with a prison inmate whose own appeal of right has long since

passed. Moreover, given the widespread and routine use of federal habeas corpus proceedings as a second avenue of appeal, the relationship between federal habeas proceedings and pending state court litigation is a constant source of friction which this Court can ameliorate by drawing a careful distinction between an accused's right to counsel under the Sixth Amendment under Massiah v United States, 377 US 201; 84 S Ct 1199; 12 L Ed 2d 246 (1964), and a litigant's ability to retain counsel to pursue a private cause of action.

Under 1963 Const, Art I, sec 20 a state criminal defendant has an appeal of right to the Michigan Court of Appeals. Cf, MCL 600.309; MSA 27A.309, MCR 7.203. Compare, MCL 600.232; MSA 27A.232, MCR 7.301. Given this appeal of right, both state and federal law grant indigent defendants the right to appointed counsel, in order to prosecute

such an appeal. 1963 Const, Art I, sec 20; Griffin v Illinois, 361 US 12; 76 S Ct 585; 100 L Ed 891; 55 ALR2d 1055 (1963).

However, given the fact that the appointment of counsel constitutes the expenditure of public monies, the right to appointed appellate counsel extends no further than the right to appeal. Ross v Moffitt, 417 US 600; 94 S Ct 2437; 41 L Ed 2d 341 (1974); People v Berry, 384 Mich 270 (1974). Accordingly, state law limits the authority of appointed counsel to representing the indigent defendant in trial court postconviction proceedings, to litigating the matter in the Court of Appeals, and -- if counsel prevails in the Court of Appeals -- to responding to any application filed in this Court by the prosecution. MCR 6.425(F)(1)(c); prior citation, 6.101(J)(2).

In this case, Respondent had already prosecuted her appeal of right, and her conviction had become final long before she came to file habeas proceedings in federal court. Cf, People v Gonyea, 421 Mich 462 (1984); Cahill v Rushen, 678 F2d 791 (CA 9, 1982). Accordingly, she had no right to counsel under existing law, and the trial court erred in finding otherwise. Moreover, Michigan courts have held that whatever the ethical constraints against attorneys conversing with opposing parties, the mere fact of conferring with a party outside counsel's presence does not justify the exclusion of evidence, absent some independent constitutional violation. People v Green, 405 Mich 273 (1979). And as presence at interrogation is outside the core function of counsel, it was fundamental error of constitutional magnitude for the trial court to extend the prophylactic rules of Edwards v Arizona, 451 US 477; 101 S Ct 1880;

68 L Ed 2d 378 (1981) and Michigan v Jackson, 475 US 625; 106 S Ct 1404; 89 L Ed 2d 631 (1986) to a case where the defendant's direct appeal had run its course, and a mere collateral attack was pending in a civil action in a different jurisdiction.[1]

In any event, in this matter there was no pending criminal case against Respondent when the police interviewed her -- the Sixth Circuit had not yet granted her the certificate of probable cause needed to proceed with her federal appeal, and had not yet appointed counsel. Moreover, the police were not parties to the pending civil

---

[1] In point of fact, there is also a substantial and unresolved question about the propriety of this Court requiring state courts to adhere to "prophylactic" rules which require the exclusion of evidence obtained under circumstances which do not violate the United States Constitution. See, eg, Grano, Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy, 80 NWU L Rev 100 (1985); Caminsky, A Challenge to Miranda, 14 Search and Seizure L Rpt 145 (1987).

litigation in Federal Court, placing Respondent and the police in the same posture as we would find them if Respondent were pursuing a separate cause of action for tort -- and, to the best of counsel's knowledge, there is no rule of law forbidding the police to talk to anyone who has hired an attorney for any reason under the sun, absent an affirmative invocation of some constitutional right. See, Cahill v Rushen, supra at 796-806 (Wallace, J, dissenting). Thus, it is difficult to understand how Respondent can claim a constitutional violation of any sort: whatever the Court may think of the tactics employed, Respondent could not, and cannot, point to any provision of the Constitution affording her the right to counsel at the time of her statement; and there can be no violation of a right which does not exist.

Accordingly, the trial court's ruling was in error, and this Court should reverse.

CONCLUSION

WHEREFORE, Petitioner prays that this Court grant certiorari, reverse the holding of the Michigan Court of Appeals, and remand the cause for further proceedings.

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Dated: July 15, 1993
JC/eb

APPENDIX A

APPENDIX A

THE COURT: Thank you.

Based upon the testimony that was given by Ms. Marsh, she indicated that she did in fact speak to the officer voluntarily.

The concern that I have relative to the use of the statement as substantive evidence is predicated upon the argument that counsel made that she was pretty much caught in a trap in terms of her voluntarily talking to them. Her case has been reversed and she has to stand trial again, and then the statement taken from her, ostensibly, as a witness statement, would be used against her substantively. That just doesn't seem fair.

But, by the same token, this Court is of the opinion that an individual should not have the right to hide behind some

illusory type of shield to make statements that conflict with statements that were made at a previous time when that person thought they were going to be a witness and not a defendant.

That being the situation, this Court is of the opinion that, for impeachment purposes, the statement is admissible. At the time that she was interviewed, she was being interviewed as a witness, not as a defendant. She was being interviewed as a witness against a co-defendant, Kareem Martin.

And, that being the situation, the Court is of the opinion that the same rules relative to the advisement of rights and relative to the presence of an attorney really do not apply.

Under the circumstances, this Court is of the opinion that the statement should be suppressed as substantive evidence, and allowed for purposes of impeachment, in view of the fact that it was in fact a witness statement at the time it was taken.

MR. WHALEN: Thank you.

MR. SIMOWSKI: Thank you, Your Honor. Just one matter, Your Honor, because I'm sure this isn't going to be the end of this issue.

THE COURT: I would imagine not.

MR. SIMOWSKI: Because I think it's unique. Just for clarification purposes, did the Court find a Sixth Amendment violation, as far as -- since we were aware that Mr. Whalen was counsel, but did not notify him?

THE COURT: Based upon the use of the statement as substantive evidence, I say yes, there is a Sixth Amendment violation because of the fact that Mr. Koch was aware that Mr. Whalen id in fact represent Ms. Marsh. Ms. Marsh was also well aware of that fact and never asked for an attorney to be present.

The only conclusion that I can come to in that regard is the fact that she knew she had the right to counsel and the right to have her attorney present if she was going to make a statement that incriminated herself. She knew that she was making a statement as a proposed or prospective witness in the case of the People versus Kareem Martin, and that puts a different light on the statement in that regard, as far as this had the right to an attorney, she did not feel threatened or coerced or compelled to make a statement, and never for a moment thought that that

statement would be used against her substantively as any type of confession of her complicity the events that led to the death of Koran Knighton and Ollie Scott and the wounding of Koran Knighton's mother, Cynthia.

That being the situation, the Court is of the opinion that there wasn't any Sixth Amendment violation as it relates to the statement for impeachment purposes.

MR. WHALEN: Just one more thing, Your Honor. Although I'll have to give it some thought, there is a probability that I will take an interlocutory appeal on the issue of whether it can be used for impeachment. I don't know if Mr. Simowski -- what his intentions are with regard to the use of it as substantive evidence, but in the event that I do file a timely affidavit for interlocutory appeal, I would ask this Court

for a stay of proceedings pending a resolution by the Court of Appeals.

THE COURT: What is your position on that, Mr. Simowski?

MR. SIMOWSKI: Judge, I've been thinking about that. We have a trial date tentatively set of February 26th, 1990, and I thing that would be plenty of time for the Court of Appeals to resolve this issue -- at least the Court of Appeals. Now, what I'm afraid of on a motion to stay is that this case is already 11 years old, and if we wait until all the appeals are exhausted, that will take us to the year 2000, assuming it takes 11 years like the original appeal did.

I would ask the Court not to give a motion to stay. I think that our February 26th date will give us an indication by the Court of Appeals one way or another, and like

I said, this issue isn't going to rest with the Court of Appeals, anyway.

THE COURT: I'm not going to grant the stay. I recognize that you will probably file a motion for an interlocutory appeal, but I am not going to grant a stay.

Based upon my experience with the Court of Appeals, if they're going to grant one, they'll probably do it the day before trial, anyway. If I grant a stay, we wouldn't have a decision for the next six or seven months.

MR. WHALEN: Could I reserve the right to raise the motion again in the event that the Court of Appeals grants leave --

THE COURT: Yes.

MR. WHALEN: I will present an order.

THE COURT: Thank you both.

APPENDIX B

STATE OF MICHIGAN
COURT OF APPEALS

April 12, 1993

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

v No: 122561

CLARISSA MARSH,
Defendant-Appellee.

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee, No: 122998

v

CLARISSA MARSH,
Defendant-Appellant.

Before: Doctoroff, C.J., and Weaver and White, JJ.

PER CURIAM.

We have before us interlocutory appeals by both the State and defendant from a ruling on defendant's motion to suppress. The court's order on that motion ruled that the statement would not be admissible against her as substantive evidence, contrast with People v Green, 405 Mich 273, 274 NW2d 448

(1979), but was admissible for impeachment purposes. See People v Stacy, 193 Mich App 19; 484 NW2d 675 (1992). After reviewing the record and the issues and argument presented by both parties, we affirm the order.

/s/ Martin M. Doctoroff
/s/ Elizabeth A. Weaver

STATE OF MICHIGAN
COURT OF APPEALS

April 12, 1993

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

v

No: 122561

CLARISSA MARSH,
Defendant-Appellee.

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

No: 122998

v

CLARISSA MARSH,
Defendant-Appellant.

Before: Doctoroff, P.J., and Weaver and White, JJ.

WHITE, J. (concurring).

I concur in the memorandum opinion because under the unique facts of this case, defendant's right to counsel was violated and therefore her statement cannot be used against her as substantive evidence. I agree that the statement can be used for impeachment purposes because it was not coerced by fear or threat of harm and was not induced by any promise or hope or reward or immunity.

/s/ Helene N. White

APPENDIX C

APPENDIX C

ORDER MICHIGAN SUPREME COURT

Entered: June 25, 1993

96482 & (86)

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,
Cross-Appellee,

v

SC: 96484
COA: 122561; 122998
LC: 78-7257

CLARISSA MARSH,

Defendant-Appellee,
Cross-Appellant.

On order of the Court, the application for leave to appeal and the application for leave to appeal as cross-appellant are considered, and they are DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

SEAL

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of Court.

June 25, 1993 Signed, Clerk